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OFFICE OF THE SECRETARY

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March 8, 2001

EX PARTE OR LATE FILED

**ExParte**

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W. – The Portals
Washington, DC 20554

RE: *Intercarrier Compensation for ISP-Bound Traffic, CC Docket 99-68*

Dear Ms. Salas:

The attached letter from the undersigned was provided to Ms. Dorothy Attwood on March 7, 2001. It should be entered in the record of the above proceeding.

Please do not hesitate to call if you have any questions.

Sincerely,

Susanne Guyer

Attachment

cc: T. Preiss
A. Candeub

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March 7, 2001

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
5th Floor
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket No. 99-68

Dear Ms. Attwood:

The record in this docket supports a direct move to bill and keep for Internet-bound traffic. If, however, the Commission elects to require a transition prior to adoption of a bill and keep requirement, it should establish rules that produce a true downward transition in reciprocal compensation payments for Internet-bound traffic and preclude gaming of the regulatory process to circumvent that result. In particular, if the Commission does require a transition, it should address the following points:

1. As we have explained in previous submissions, consistent with a long line of Commission precedent, Internet-bound traffic is interstate and subject to the Commission's jurisdiction. The D.C. Circuit did not hold otherwise. Indeed, in a recent argument in another case, the Court corrected a party that suggested the Court had already rejected the Commission's prior analysis that Internet-bound calls were interstate access. The Court made clear that it had merely decided that the Commission's prior decision to that effect in its declaratory ruling on reciprocal compensation was not "adequately supported." *See WorldCom Inc. v. FCC*, DC Cir. Case No. 00-1002, Transcript of Proceedings at 14 (Feb. 21, 2001) (copy attached). The Commission's orders, properly explained, provide that support.

2. If the Commission sets caps on the rates payable for Internet-bound traffic, the caps and related limits should be designed to actually reduce intercarrier compensation payments for Internet-bound traffic. To do this, any rate caps should be no higher than the lowest rates negotiated by carriers through interconnection agreements. Carriers costs are undoubtedly lower than their contracted-for rates. *See* attached bullets. Moreover these CLECs have a source of revenues for this traffic from the services they sell to their own ISP customers. *See General Communication, Inc. v. Alaska Communication Systems*, EB-00-MD-016, Memorandum Opinion and Order, ¶ 38 (rel. Jan. 24, 2001) (carriers should look to local rates charged ISPs to recover costs of service). Lower rates will reduce the incentive to game the regulatory process. There is abundant evidence in the record that the costs for carriers to hand-off Internet-bound or other concentrated one-way traffic is lower than for two-way traffic. *See, e.g.*, Verizon Comments, Declaration of William E. Taylor (filed July

21, 2000); SBC *Ex Parte* Letter (filed February 14, 2001). Similarly, the higher the compensation rate, the greater the disincentive for CLECs serving ISPs or other sources of concentrated traffic to compete for local customers.

3. With respect to identifying Internet-bound traffic, the Commission should establish a traffic imbalance benchmark above which traffic is presumed to be Internet-bound and below which it is presumed to be local. For example, the Massachusetts DTE presumes that traffic is Internet-bound if the ratio of payments to a CLEC exceeds 2:1 — that is, when the CLEC terminates more than twice as much traffic as it originates.[1] As the DTE explained: "In the current absence of a precise means to separate ISP-bound traffic from other traffic, we believe that Bell Atlantic's 2:1 ratio as a proxy is generous to the point of likely including some ISP-bound traffic. However, this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to . . . adduce evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy."[2] Likewise, if a carrier can prove that traffic below the selected presumption is Internet-bound, then that traffic should also be subject to the Commission's transition rules.

4. Verizon understands that one requirement under consideration is that in order to take advantage of a reduced rate for intercarrier compensation on Internet-bound traffic in a particular state, an incumbent carrier must offer an alternate rate structure that includes an equivalent rate in its SGAT or model contracts in that state. If the Commission were to impose such a requirement, such rate would apply to local traffic going both directions. Clearly, the reduced rate when applied for delivery of local traffic to the ILEC would be available only at the ILEC's end-office.

5. The Commission should make clear that only truly "local" calls can be relied on to defeat the jurisdictional presumption. That is the only result consistent with the Commission's rules, which are clear that in order to be a local call, a CLEC must have a customer that is in the same local calling area as the calling party. *See* 47 C.F.R. § 51.701 (reciprocal compensation is for transport and termination of "local telecommunications traffic" and that is defined as traffic "that originates and terminates within a local service area established by the state commission"). Where a CLEC does not have a customer in a local exchange area, but offers local numbers in that area as an "FX-like" service, such a service is not local and is not eligible for reciprocal compensation at all. *See Interconnection Order*, ¶ 1034 ("We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area"); *see also New England Fiber Communications d/b/a Brooks Fiber Proposed Tariff Revision*, Maine Public Utilities Commission, Dkt. No. 99=593, Order On Reconsideration (Nov. 14, 2000) (rejecting a

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[1] Order, *Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered Into Under Sections 251 and 252 of the Telecommunications Act of 1996*, DTE 97-116-C, at 28 (Mass. D.T.E. May 19, 1999) (available at <http://www.state.ma.us/dpu/telecom/97-116-c/97-116-c.htm>).

[2] *Id.* at 28 n.31.

Brooks Fiber FX-like service as non-local: "If Brooks uses the services and facilities of another carrier for the provision of Brooks's services, the amount it pays that carrier for the use of those facilities must be governed by that carrier's tariff, and in particular by the definition that carrier uses as the demarcation between local and long distance service and rates. Otherwise, the purchaser could avoid wholesale long distance (access) charges simply by labeling its service as 'local.'").[3]

6. Consistent with a true transition, the Commission should not undo state decisions where the local regulator has moved further towards bill and keep, either by adopting bill and keep outright, by adopting a lower rate ceiling, by adopting lower thresholds above which traffic is presumed to be Internet-bound, or other policy decisions that have the effect of lowering intercarrier compensation below the level that would be payable under the Commission's order. It makes no sense to force carriers to go backwards and be required to increase payments as part of a transition to lower payments.

7. To limit gaming, the Commission should not allow carriers to opt into other agreements that specifically require an ILEC to pay a specific rate on Internet-bound traffic regardless of change of law. Because Internet traffic is not subject to the reciprocal compensation requirements of section 251 and 252, the requirements of section 252(i) do not apply to provisions dealing with such traffic. To avoid a window where carriers will have an opportunity to attempt to circumvent its order (resulting in more litigation and uncertainty), the Commission should make its order effective on release, rather than on publication. This is especially important with respect to any restrictions on "opting-in" to an existing agreement.

Please call me if you have questions about any of these issues.

Sincerely,

Susanne Guyer

cc: T. Preiss
A. Candeub

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[3] Order available at http://janus.state.me.us/mpuc/orders/98/98758oor.pdf.

**ATTACHMENT**

- **Any transition plan adopted by the FCC should significantly reduce current payment levels on Internet traffic in order to wean carriers from their dependency on uneconomic arbitrage.**

  - Any transitional rate should decrease over the life of the transition plan to avoid encouraging carriers to continue gaming the system and to break their dependency on a perceived entitlement.

  - Any declining transitional rate should take into account the unique nature of Internet traffic.

    - Through their recent contracts, carriers have acknowledged that their costs for Internet traffic are negligible. The costs are undoubtedly lower than their contracted-for rate of .07 cents; other estimates peg their costs at less than .05 cents.

    - Carriers have a second source of revenues for this traffic from the services they sell to their own customers.

- **Any transition plan should be structured to prevent carriers from perpetuating the uneconomic arbitrage through gaming.**

  - Any transitional rate should apply only to traffic imbalances above some fixed threshold on a carrier by carrier basis in a given state, and should apply only up to a fixed cap.

    - The Commission should presume that traffic above certain imbalance levels is internet-bound. CLECs would still be free to offer proof to state regulators that traffic above the threshold is not internet-bound. Likewise, ILECs would be free to offer proof that traffic below the threshold is internet-bound.

  - Any obligation imposed on the ILEC to accept reduced reciprocal compensation rates should apply only to traffic imbalances that are the same as those for other carriers.

  - Carriers should not be permitted to game the system by shifting traffic between affiliates or by creating "new" carriers in order to inflate the payments they receive on Internet traffic.

  - Carriers should not be permitted to avoid the transition rules by adopting other carriers' contracts that have no change of law provision.

- The Commission should make clear that, because Internet traffic is not subject to the reciprocal compensation requirements of section 251 and 252, the requirements of section 252(i) do not apply to provisions dealing with such traffic.

- **Any transition plan should not upset orders by state commissions that already have gone further than the transition plan in moving toward bill and keep.**

  - Some states have already moved to fix the reciprocal compensation problem, for example by adopting bill and keep or by adopting lower rates or more aggressive limitations than those being considered by the Commission.

  - To avoid undercutting these state decisions, and thereby require an increase in reciprocal compensation payments from the ILECs, the Commission should provide that its transition rules apply only in those states that have not already gone further to move toward bill and keep.

  - The Commission should also reaffirm its prior conclusion (relied on by many of these states) that Internet-bound traffic is interstate and interexchange.

# TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WORLDCOM INC., ET AL.,

Petitioner,

v. No. 00-1002

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

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Pages 1 through 48

Washington, D.C.
February 21,2001

the origination or termination of telephone toll service. In other words, when you connect to your ISP, whether it be by dial up or whether it by DSL, you're doing that to get information services, not to make a long distance call.

The FCC cited the order of remand to this Court in Bell Atlantic. It made the same arguments in Bell Atlantic that it makes here. That is, at times noncarriers can be purchasers of exchange access, that the statement in nonaccounting safeguards order that ISPs do not use exchange access was wrongly decided, that historically, this has always been an interstate access service and the Court rejected them, rejected those arguments. First said in Bell --

THE COURT: Did we say they were wrong or simply that they were not adequately supported?

MR. BRADFORD: I think that the Court said that they were not adequately supported. I would go further and say they were wrong --

THE COURT: I understand you would go farther, but you're not saying we went farther?

MR. BRADFORD: No, I think -- the way I look at it, Your Honor, is that this Court sets some hurdles --

THE COURT: And it may be good enough.